

Decision 06-06-037

June 15, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Evaluate Existing Practices and Policies for Processing General Rate Cases and to Revise the General Rate Case Plan for Class A Water Companies.

Rulemaking 03-09-005
(Filed September 4, 2003)

ORDER MODIFYING DECISION (D.) 06-02-010 REGARDING ADOPTION OF AN ADVICE LETTER MECHANISM FOR CLASS A WATER UTILITIES TO SEEK WAIVERS OF RATE CASE PLAN REQUIREMENTS, AND DENYING REHEARING, AS MODIFIED

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 06-02-010 ("Decision") filed by the Division of Ratepayer Advocates ("DRA").

In D.04-06-018,¹ we adopted a revised Rate Case Plan ("RCP") that requires Class A water utilities (i.e., those with more than 10,000 service connections) to submit general rate cases ("GRC") by a formal application process on a three-year cycle pursuant to Public Utilities Code Section 455.2.² The proceeding was left open to resolve specified Phase II issues.

¹ *Order Instituting Rulemaking on the Commission's Own Motion to Evaluate Existing Practices and Policies for Processing General Rate Cases and to Revise the General Rate Case Plan for Class A Water Companies* ("RCP Decision") [D.04-06-018] (2004) __ Cal.P.U.C.3d __, 2004 Cal. P.U.C. LEXIS 276.

² All section references are to the Public Utilities Code unless otherwise specified.

In Resolution W-4556, we granted the request of Great Oaks Water Company (“Great Oaks”), a Class A water utility, to file its GRC by advice letter rather than by the formal application process. The Resolution stated that the request was granted as an experiment to determine whether and when the advice letter process may be a suitable alternative to the formal application process.

In D.05-12-048,³ we denied rehearing of Resolution W-4556 on the basis of equity, but directed that a new or existing rulemaking proceeding should be used to consider whether to establish procedures by which small Class A water utilities may file their GRCs by advice letter.

In D.06-02-010, we resolved the outstanding Phase II issues in the RCP rulemaking proceeding, and adopted an advice letter mechanism to allow all Class A water utilities to seek a waiver of any requirement of the RCP.

On March 20, 2006, the Division of Ratepayer Advocates (“DRA”) timely filed an application for rehearing challenging D.06-02-010 on the grounds that: (1) the Decision violated DRA’s due process rights by failing to provide adequate notice and opportunity to be heard on the issue of adopting the new advice letter mechanism; (2) there is no record to support adoption of the advice letter mechanism; (3) the Decision does not contain necessary findings of fact and conclusions of law on material issues as required by Section 1705; and (4) the Decision is inconsistent with the Commission’s stated direction in D.05-12-048. No responses were filed.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause has been established to modify D.06-02-010 to remove portions which act to adopt a rule allowing Class A water utilities to use an advice letter mechanism to seek waivers of RCP requirements. Rehearing of D.06-02-010, as modified, is denied. Issues related to whether Class A water companies should be

³ *Order Denying Rehearing of Resolution W-4556 and Ordering an OIR (“Res. W-4556 Rehearing Order”)* [D.05-12-048] (2005) __ Cal.P.U.C.3d __.

allowed to use an advice letter process to seek waivers of RCP requirements shall be included for comment in a future rulemaking proceeding.

However, unless and until such a rule is adopted, any Class A water utility wishing to use an advice letter process to seek a waiver of requirements under the RCP for itself specifically can file a petition for modification of the *RCP Decision* (D.) 04-06-018.

II. DISCUSSION

Today we address only the due process issue regarding notice and opportunity to be heard raised by DRA, and determine the argument has merit. Accordingly, we are modifying D.06-02-010 to address the issue, and thus we deny rehearing of D.06-02-010, as modified. All other issues raised by DRA in its application for hearing are made moot by our modifications of D.06-02-010.

While DRA does not contest the Commission's authority to adopt an advice letter procedure, DRA contends the Decision errs because the process employed in adopting that mechanism in this proceeding failed to provide adequate notice and opportunity to be heard. Thus, DRA contends the Decision violated its due process rights. (DRA Rhg. App., pp. 3-5.) As discussed below, there is merit to DRA's contention.

DRA cites to *People v. Western Airlines Inc.*, (“*Western Airlines*”) (1954) 42 Cal.2d 621, 1954 Cal. P.U.C. LEXIS 193; and *Railroad Commission of California v. Pacific Gas and Electric Company* (“*Railroad Commission v. PG&E*”) (1938) 302 U.S. 388, 1938 Cal. P.U.C. LEXIS 2, to establish that the Commission is bound by constitutional due process requirements. Under these cases, due process requirements are met when affected parties are provided notice and opportunity to be heard, and the Commission acts upon evidence and not arbitrarily, before a valid order can be made.

DRA asserts it did not have proper notice that the advice letter issue was to be considered in this proceeding because adoption of the new procedure was first raised in the proposed decision. DRA cites to *California Trucking Association v. Public*

Utilities Commission (“*California Trucking Assn.*”) (1997) 19 Cal.3d 240, 1997 Cal. LEXIS 128, for the proposition that its right to notice and opportunity to be heard is not satisfied merely by giving a party the opportunity to submit written objections to a proposed decision. (DRA Rhg. App., pp. 3-4.)

In its comments on the proposed decision, DRA objected to adoption of the advice letter procedure without reopening the record to take comment and/or evidence from the parties on relevant considerations. (Comments of DRA on the Draft Decision, dated February 1, 2006, pp. 4-7.) The Decision rejects that request, reasoning that parties would receive notice and opportunity to comment at the time any individual advice letter is submitted seeking a particular waiver. (D.06-02-010, pp. 2, 5.) Upon further review and consideration, we believe this reasoning does not satisfy the requisite due process requirements of notice and opportunity to be heard on the advice letter issue.

In *California Trucking Assn.*, we had issued a proposed decision which modified a prior decision with respect to the method for spreading rate increases. The report had been sent informally by letter to various interested parties soliciting comments and suggestions, and we mistakenly believed that the right to comment upon the staff proposal satisfied the obligation to provide notice and opportunity to be heard. In fact, the statutory due process requirements under Sections 1708, and 1701-1706 had not been met, in particular a parties’ right to be heard and introduce evidence as provided by Section 1705. Section 1708 had not been satisfied merely by giving a party the opportunity to object to a proposal or protest a proposed decision.

The procedural aspects of this proceeding are analogous to *California Trucking Assn.* for purposes of establishing the due process requirements. As in *California Trucking Assn.*, our action in D.06-02-010 alters or modifies requirements set forth in prior Commission decisions. In particular, we concluded in the recent *Res. W-4556 Rehearing Order* that allowing Class A water utilities to submit their GRC’s by advice letter rather than by formal application would amend the *RCP Decision* and the

decision adopting the advice letter process for Class B, C, and D water utilities.⁴ (*Res. W-4556 Rehearing Order* [D.05-12-048] *supra*, at pp. 5-7 (slip op.).) Accordingly, we directed that: [w]e intend that any modification of our rules should be done in a manner that satisfies due process requirements” (*Id.*, at p. 2 (slip op.)), and that any modification of the existing rules be accomplished by traditional mechanisms providing for full stakeholder participation. (*Id.*, at pp. 5-7 (slip op.).)

Because parties to D.06-02-010 received opportunity to comment on the advice letter issue only at the time of the proposed decision, DRA is correct that adequate notice and opportunity to be heard was not provided consistent with *California Trucking Assn.* and our own direction in the *Res. W-4556 Rehearing Order*.

For these reasons, we will modify D.06-02-010 to remove the portions of the decision that relate to our adoption of a rule that permits Class A water companies to use an advice letter process to seek waivers of RCP requirements. Our modifications are specifically set forth below in the Ordering Paragraphs. We deny rehearing of D.06-02-010, as modified. All Phase II issues as decided in D.06-02-010 remain unchanged.

Issues related to whether Class A water companies should be allowed to use an advice letter process to seek waivers of RCP requirements shall be included for comment in a future rulemaking proceeding. Unless and until such a rule is adopted, any Class A water company wishing to use an advice letter process to seek a waiver of RCP requirements for itself specifically, may file a petition to modify the RCP Decision for Class A water companies (See *RCP Decision* [D.04-06-018] *supra*).⁵

⁴ See *Investigation on the Commission’s Own Motion Into Financial and Operational Risks of Commission Regulated Water Utilities, and Whether Current Ratemaking Procedures and Policies Require Revision* (“*Water Co. Advice Letter Decision*”) [D.92-03-093] (1992) 43 Cal.P.U.C.2d 568; 1992 Cal. P.U.C. LEXIS 237.

⁵ We note that the modifications affect only the advice letter issue and our determinations as to all other Phase II issues remain resolved and final as determined by D.06-02-010.

III. CONCLUSION

For the reasons specified above, D.06-02-010 is modified to remove portions of the Decision adopting a rule to allow Class A water companies to use an advice letter process to seek waivers of RCP requirements. Rehearing of D.06-02-010 is denied, as modified. All Phase II issues as decided in D.06-02-010 remain unchanged.

THEREFORE, IT IS ORDERED that:

1. D.06-02-010 is modified to remove portions adopting an advice letter mechanism to allow Class A water companies to seek waivers of Rate Case Plan requirements as follows:

a) The first sentence on page 1, is modified to read:

“This decision resolves the outstanding Phase II issues regarding water Rate Case Plan (RCP) requirements, modifies the filing requirements in one respect, and closes the proceeding.”

b) The following language is deleted from page 2:

“Besides the Phase II activity, on December 15, 2005, the Commission issued D.05-12-048, which addressed the application for rehearing of the Commission resolution granting Great Oaks Water Company authority to file its GRC by advice letter rather than application. That decision ordered that procedures be adopted for seeking waivers from RCP requirements, including using the advice letter process rather than GRC application. In today’s decision, we adopt the advice letter process as the vehicle for requesting waivers.”

c) The following language on pages 2-3 is deleted:

“The RCP requirements do not and cannot anticipate all possible circumstances. Utilities should have a clearly stated means to seek waiver of requirements that are inappropriate or inefficient. The advice letter process is the most expeditious procedural means that will allow other stakeholders an opportunity to comment on the proposed waiver of a RCP requirement, and is the procedure we selected in D.04-06-018 for seeking waivers of GRC filing requirements as provided in § 455.2(c). Therefore, any utility

seeking waiver of any RCP requirement should file an advice letter, consistent with General Order 96-A, or its successor, and serve all parties to this docket in addition to any other required parties.”

d) The second paragraph on page 3 under Comments on Draft Decision is changed to read:

“The Division of Ratepayer Advocates (DRA), formerly known as the Office of Ratepayer Advocates, files comments and recommended that the Commission adopt the Water Division...”

e) The following language on page 4 is deleted:

“Cal Am stated that the California Constitution, Public Utilities Code, and the Commission’s Rules of Practice and Procedure grant the Commission full authority to adopt the advice letter process as the mean to request waivers of “inappropriate or inefficient” requirements of the RCP. Cal Am pointed to the plain language of § 455.2 as allowing the Commission to waive the formal general rate case filing requirement completely, and concluded that such authority necessarily encompasses the ability to waive “superfluous and inapplicable procedures under the RCP.”

f) The following language on page 5 is deleted:

“We are not persuaded that the Commission lacks the power to adopt a procedural mechanism that allows a utility to place before the Commission novel factual or legal circumstances which, the utility contends, render “inappropriate or inefficient” certain components of the RCP, and to seek a waiver of such a provision. As Park noted, a request in no way guarantees approval. All parties will receive notice and be afforded the opportunity to comment on the request.”

g) Conclusion of Law Number 1 on page 6 is deleted.

h) Ordering Paragraph Number 1 on page 6 is deleted.

2. Issues related to whether Class A water companies should be allowed to use an advice letter process to seek waivers of RCP requirements shall be included for comment in a future rulemaking proceeding.

3. Rehearing of D.06-02-010, as modified, is hereby denied.

4. This proceeding, R.03-09-005, is closed.

This order is effective today.

Dated June 15, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners